STATE OF MICHIGAN

COURT OF APPEALS

MARIE MICHAJLYSZYN,

Plaintiff-Appellee,

v

WALTER MICHAJLYSZYN,

Defendant-Appellant.

UNPUBLISHED
June 2, 2005

No. 252681
Macomb Circuit Court
LC No. 2002-004456-DO

Before: O'Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm.

Defendant raises two substantive arguments. First, defendant argues that the trial court improperly failed to hold an evidentiary hearing into alleged fraud and mutual mistake regarding the parties' settlement agreement. Second, defendant argues that the judgment of divorce contains a provision contrary to the parties' agreement. We disagree with both arguments.

In reviewing a divorce action, we will uphold a trial court's findings of fact unless they are clearly erroneous, and we will uphold a trial court's dispositional ruling unless we are firmly convinced that it is inequitable. *Stoudemire v Stoudemire*, 248 Mich App 325, 336-337; 639 NW2d 274 (2001). However, conclusions of law, including erroneous applications of law to facts, are reviewed de novo. *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). A trial court's decision to set aside a prior judgment is reviewed for abuse of discretion. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). "Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through negotiation and agreement of the parties." *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). Finally, "a settlement agreement, which is what the stipulation and property settlement is, is a contract and is to be construed and applied as such." *Massachusetts Indemnity and Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994).

Although a trial court generally abuses its discretion by failing to conduct an evidentiary hearing before deciding a motion for relief from judgment where fraud is alleged, an evidentiary hearing is not required "where the party requesting relief fails to provide specific allegations of fraud relating to a material fact." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 404-405; 651 NW2d 756 (2002). Here, the allegations of fraud related to plaintiff's presumably separate, inherited property, so they were not material to the final property settlement.

"Normally, property received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution." *Dart v Dart*, 460 Mich 573, 585; 597 NW2d 82 (1999). While a trial court has the discretion to include an inheritance as a marital asset if the award would otherwise be insufficient, *Demman v Demman*, 195 Mich App 109, 112; 489 NW2d 161 (1992), or if there is a "nexus" between some activity during the marriage and the value of the inherited assets, *Dart*, *supra* at 585 n 6, there is no allegation in this case that would invoke either of these exceptions. Therefore, defendant failed to allege any facts suggesting that the inheritance is anything other than separate property to which he would have no sustainable claim. Under these circumstances, any fraudulent concealment of the inheritance's true worth would be immaterial to defendant's final share of the distribution, and no hearing was necessary.

Defendant also alleges that the parties' settlement agreement was premised on a mutual mistake of fact regarding whether his Navy pension would continue to pay benefits to plaintiff in the event that she remarries. However, defendant fails to allege a mutual mistake of fact. Rather, he only demonstrates that he misapprehended the law. Defendant's assertions in his affidavit and briefs and on the record show that he was the sole source of information regarding the legal effect of the pension. Unilateral mistakes do not justify rescission, *Limbach v Oakland Co Bd of Co Road Comm'rs*, 226 Mich App 389, 394; 573 NW2d 336 (1997), nor does a "[m]istake as to the legal effect of a written instrument, deliberately executed and adopted." *Rzepka v Michael*, 171 Mich App 748, 756; 431 NW2d 441 (1988).

Furthermore, presuming there was a mutual mistake ostensibly indicating the possibility that the parties' agreement should be rescinded, that remedy may not be used by "a party who has assumed the risk of law in connection with the mistake." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 30; 331 NW2d 203 (1982), citing Restatement Contracts, 2d, § 154. Under the circumstances of this case, defendant assumed the risk of being mistaken. He effectively held himself out as an authority on this technical subject despite being advised during mediation that some of his understandings were incorrect. Despite that warning, he treated his knowledge as sufficient, and it would be reasonable for the trial court to assign any risk of mistake to him. Restatement Contracts, 2d, § 154. Therefore, even if there had been a mutual mistake, rescission would not be justified.

Because any fraud was immaterial and any mistake was inconsequential, the trial court was not obligated to provide an evidentiary hearing.

We also reject defendant's argument that the final judgment fails to conform to the parties' agreement because the trial court awarded plaintiff cost-of-living increases after plaintiff waived them on the record. We disagree with defendant's factual premise. The parties agreed at the first hearing that defendant's pension would be split "50/50" by whatever means would be required to effectuate the split. The parties are bound to that agreement. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999), citing MCR 2.507(H). The final written judgment does not include any reference to cost-of-living increases, but specifically reflects the 50 percent split that the parties agreed to on the record. Therefore, we perceive no

difference between the judgment as entered and the parties' agreement as stated on the record. The final judgment reflects the original agreement that the parties placed on the record, so defendant's argument lacks factual merit.[1]

Because we reject defendant's claims of error, it is unnecessary to address his request for a different judge on remand.

Affirmed.

/s/ Peter D. O'Connell
/s/ Jane E. Markey

[1] The oral property settlement placed on the record below is identical to the written order signed by the trial court. In response to the concurrence/dissent, we note that plaintiff conceded her inability to receive COLA below and did not retract that concession here, so plaintiff's ability to recover any COLA appears doubtful at best. Nevertheless, the written order signed by the trial court does not address the issue of COLA or determine the legal ramifications of this concession, so we have no error to review.